

STATE OF NEW MEXICO
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September 14, 2009

MEMORANDUM

TO: Legislative Education Study Committee

FR: Nicole Parra-Perez *nypp*

RE: STAFF REPORT: RESTRAINT AND SECLUSION OF STUDENTS

Since 2006, attention to issues of physical restraint and seclusion of students has risen across the United States as a result of published accounts of alleged abuse, which prompted an investigation by the Government Accountability Office (GAO) at the request of the US House Education and Labor Committee. The GAO report, published May 19, 2009, found "no federal laws restricting the use of seclusion and restraint in public and private schools and widely divergent laws at the state level."

In New Mexico, a review of current state law indicates that physical restraint and seclusion are addressed in provisions of the *Children's Mental Health and Developmental Disabilities Act (Children's Code)*. These provisions, however, apply to "children in hospitals or psychiatric residential treatment or habilitation facilities as provided by federal law and regulation."

According to the Public Education Department, (PED) the *Public School Code* does not include provisions specific to the restraint and seclusion of students. The department reports however, that two PED guidance documents have been issued to school districts related to these issues, namely:

- in 2003 guidance "Use of Time-Out Rooms as a Behavioral Intervention"; and (see Attachment 1).
- more recently, in 2006, "Use of Physical Restraint as a Behavioral Intervention for Students with Disabilities" (see Attachment 2). This guidance states that physical

restraint may be justified in certain instances, but it also recognizes that this type of intervention can pose a serious risk to the student, as well as to the person(s) applying the restraint.

A May 27, 2009 news release issued by PED, claims that New Mexico leads many states in providing guidance, training, and procedural safeguards for students with disabilities; however, representatives of advocacy organizations in the state have raised concerns as to whether state law should address public school district compliance.

While physical restraint and seclusion can apply to all students, this staff report focuses on providing the committee with an overview of the concerns and issues of several New Mexico advocacy groups pertaining to the restraint and seclusion of special education students and students covered by Section 504 of the *Rehabilitation Act* who do not qualify for special education services but are living with a disability. This report includes six sections:

- Findings of the GAO Report and the Response from the United States Department of Education (USDE);
- New Mexico Advocacy Group Concerns;
- Frequency and Severity of Restraint, Isolation and False Arrest Claims;
- School District Training Provided by the Cuddy Law Firm;
- Public Education Department Response; and
- Policy Options.

Findings of GAO Report and Response from the USDE

On May 19, 2009, the Education and Labor Committee in the US House of Representatives held a hearing to examine the abusive and potentially deadly misapplication of seclusion and restraint techniques in schools. Related to this hearing was a report issued on the same day by the GAO on “Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers.”

Among its findings, the GAO report indicates that:

- federal laws restricting the use of seclusion and restraints in public and private schools do not exist;
- state laws are widely divergent;
- hundreds of cases of alleged abuse and death related to the use of restraint and seclusion have resulted in criminal convictions, findings of civil or administrative liability, or large financial settlements in the past 20 years;
- 19¹ states, including New Mexico, require parents to be notified after restraints have been used;
- 17² states, including New Mexico, require that selected staff receive training before being permitted to restrain children; and

¹ California, Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and Virginia.

² California, Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Texas, and Virginia.

- not a single governmental website or agency collects information on the use of these methods or the extent of their alleged abuse.

In response to the GAO findings, on July 31, 2009, US Education Secretary Arne Duncan sent a letter to Chief State School Officers encouraging each state to review its current policies and guidelines regarding the use of restraints and seclusion techniques in schools and, if appropriate, to develop or revise them to ensure the safety of students.

Among other recommendations, Secretary Duncan encouraged states to:

- develop or review and, if appropriate, revise state policies and guidelines to ensure that every student in every school under state jurisdiction is safe and protected from being unnecessarily or inappropriately restrained or secluded;
- publicize these policies and guidelines so that administrators, teachers, and parents understand and consent to the limited circumstances under which these techniques may be used;
- notify parents when these events do occur;
- provide resources needed to successfully implement the policies and hold districts accountable for adhering to the guideline; and
- establish revised policies and guidance prior to the start of school year 2009-2010.

The letter notes that the Center on Positive Behavioral Interventions and Supports (Center on PBIS) is ready to provide technical assistance in these areas. According to the PBIS website, “PBIS is NOT a curriculum, intervention, or practice, but IS a decision making framework that guides selection, integration, and implementation of the best evidence-based academic and behavioral practices for improving important academic and behavior outcomes for all students.”

In the letter, Secretary Duncan also suggested that funding for the implementation of a PBIS system and professional development and coaching on such systems could be derived from:

- the federal *American Recovery and Reinvestment Act* (ARRA), including federal State Fiscal Stabilization funds;
- the federal *Elementary and Secondary Education Act* (ESEA), Title I;
- the federal *Individuals with Disabilities Education Improvement Act* (IDEA); and
- state and local funds.

New Mexico Advocacy Group Concerns

In February and March 2009, months before the release of the GAO report, out of concern for the seriousness of the potential consequences of the use of restraint and seclusion by school personnel, Pegasus Legal Services for Children, a private nonprofit agency providing civil legal services to children, youth, and their caregivers, including direct representation, community

legal education, and policy advocacy, sent out a public records request to all 89 school districts in New Mexico in order to analyze the use of time-out rooms and of restraint in public schools statewide.³

- 67 district responses included the following information regarding time-out rooms:
 - 6 districts reported that they do not allow the use of time-out rooms;
 - 14 districts had adopted policy on the use of time-out rooms;
 - 2 districts reported that they have adopted PED's 2003 guidelines, but do not use time-out rooms; and
 - 45 districts provided documents unresponsive to the request, and did not appear to have adopted any type of policy.
- 66 district responses included the following information on the use of restraints:
 - 41 districts do not appear to have adopted any policies; of those districts:
 - ✓ 6 admitted to having no policy;
 - ✓ 11 stated that they do not use restraint and consequently do not have policy responsive to the request;
 - ✓ 7 follow the PED 2006 guidelines but have not adopted their own policies; and
 - ✓ 17 provided documents unresponsive to the request and do not appear to have policies.

In addition to the survey results, Pegasus also received and gathered information on actual New Mexico cases involving the restraint and seclusion of special education students including the following selected cases:

- **Case #1:**

The student had emotional and behavioral problems that interfered with class achievement, and due to aggression shown in the classroom, was moved to a special program called "Teaching Appropriate Behavior to Students." (TABS). TABS employed a 12-by-14 foot concrete block time-out room. The student was claustrophobic and was therefore promised an alternative to the time-out room. However, she was still placed in there almost daily; hitting, kicking, and lashing out was how she reacted toward teachers. The requirements to exit the time-out room were that she sits up straight, legs out or crossed, hands below the waist, remaining verbally quiet, and remain so for five minutes; if she failed to maintain this conduct for anything less than five minutes, the time started over again. The student was not permitted to walk or lie down in the time-out room, and there was no signaling system for her to inform staff if she needed to use the restroom when left alone in room.

³ According to Pegasus, the survey does not include the district policies of 22 districts. Of those 22 districts, eight districts did not reply to the request: Alamogordo Public Schools, Artesia Public Schools, Elida Municipal Schools, Magdalena Public Schools, Maxwell Municipal Schools, Mosquero Municipal Schools, Vaughn Municipal Schools, and Zuni Public Schools. The following 11 schools needed an additional follow-up, therefore were left out of the finding: Gadsden Independent Schools, Gallup-McKinley County Public Schools, Grants-Cibola County Schools, Hatch Valley Public Schools, Hobbs Municipal Schools, Hondo Valley Public Schools, House Municipal Schools, Pecos Independent Schools, Ruidoso Municipal Schools, Santa Rosa Consolidated Schools, and Taos Municipal Schools. Three districts were not included because they charged a copying fee to have the policies sent: Lordsburg Municipal Schools, Loving Municipal Schools, and Rio Rancho Public Schools.

On occasion, the student's lunch was delayed when she was in time-out, and she was not provided meals if kept after school during her dinner hour. Following a due process hearing, the hearing officer concluded that the time-out procedure was punitive and not a consequence for inappropriate behavior.

- **Case #2:**

The student was diagnosed with a mood disorder, Attention-Deficit Hyperactivity Disorder, (ADHD) and Oppositional Defiant Disorder (ODD). He had been continuously suspended from school due to behavior, and there was no behavioral intervention plan (BIP) in place for the student. The student's mother asked for a plan to be implemented; the draft plan stated that "... if the security officer is unavailable, school staff members have permission to use a therapeutic hold/physical restraint at times when the student is a danger to himself or others." During school year 2008-2009, the mother suspected physical and verbal abuse of her son by teachers. Her son told her that he had been dragged at school by the teacher; school personnel denied this, but the mother received a video tape of the actual incident from an anonymous source. The tape clearly showed the student being dragged down the hallway into the office. The school district has been developing a BIP that includes Positive Behavioral Interventions and Support (PBIS) and de-escalation recommendations for the school staff.

At the request of Legislative Education Study Committee (LESC) staff, a collective statement on specific concerns regarding restraint and seclusion was developed and endorsed by the following advocacy groups and attorneys.

- The groups included:
 - Pegasus Legal Services for Children;
 - Disability Rights New Mexico (formerly the Protection and Advocacy System);
 - New Mexico American Civil Liberties Union (ACLU);
 - Native American Disability Law Center;
 - Parents Reaching Out;
 - New Mexico Family Network;
 - Diane Garrity; and
 - Gail Stewart.

As outlined in Attachment 3, *The Use of Restraint and Seclusion in Public Schools: Collective Statement of Advocacy Organizations and Private Attorneys Working with Children with Disabilities*, address concerns of any public education student and the use of restraint and seclusion and for children with disabilities.

Frequency and Severity of Restraint, Isolation and False Arrest Claims

In order to provide the committee with an estimate of the number and cost of claims in New Mexico related to restraint and seclusion, LESC staff requested a report of those incidents from the New Mexico Public School Insurance Authority (NMPSIA). In response to the request, Poms & Associates, NMPSIA's risk consultants, researched the number of claims and the associated cost over a 10-year period from school years 2000-2001 to 2008-2009 (see Attachment 4). The report indicates that a total of 271 instances occurred in the 10 years at a

cost of over \$4.4 million. The report also notes however, that the information may not include all cases dealing with restraints and seclusion, since some cases may be identified as civil rights violations.

School District Training Provided by the Cuddy Law Firm

In order to ascertain if training is being provided on restraint and seclusion by any entity apart from PED, LESC staff contacted the Cuddy Law Firm who represents approximately 90 percent of the school districts statewide. A staff attorney from the firm reported that training to school district personnel on restraints and seclusion is provided annually or upon request. The attorney emphasized that at the end of each training session, the firm provides the school district with two policy documents:

- “Use of Time-Out Policy,” (see Attachment 5) which outlines the purpose of the policy and a definition of “time-out,” and provides strategies to use for time-out instances; and
- “School District Restraint Policy,” (see Attachment 6) which outlines the purpose of the policy and a definition of “restraint,” and provides specific policies to follow when restraining a student.

Public Education Department Response

According to representatives of several advocacy groups, many or all of them wrote to Dr. Veronica C. García, Secretary of Public Education, expressing their concerns regarding restraint and seclusion of students and providing PED with a copy of the Pegasus survey. In their correspondence they also requested that the secretary consider forming a task force to develop statutory guidance on the use of restraint and seclusion that is consistent with the *Children’s Mental Health and Developmental Disabilities Act*.

In her response, Secretary García indicated that she would consult with department staff and discuss US Secretary Duncan’s recommendations, but that she would await further action on the issue until the topic was discussed by the LESC at this interim meeting.

Policy Option

The committee may wish to consider introducing a memorial in the 2010 Legislative Session requesting PED to form a work group to examine the issues and concerns related to restraint and seclusion of public school students in collaboration with, directors of special education and other appropriate school personnel, advocacy group representatives, parents, and other appropriate stakeholders; and to report findings and recommendations to the LESC in the 2010 interim.



ATTACHMENT 1

STATE OF NEW MEXICO
DEPARTMENT OF EDUCATION — EDUCATION BUILDING
SANTA FE, NEW MEXICO 87501-2786

MICHAEL J. DAVIS
SUPERINTENDENT OF PUBLIC INSTRUCTION

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MEMORANDUM

Date: August 7, 2003

TO: Superintendents
Special Education Directors

FROM: Sam Howarth
State Director of Special Education

RE: Use of Time-Out Rooms as a Behavioral Intervention

The New Mexico State Department of Education's (SDE's) Special Education Office (SEO) has received several requests for guidelines on the use of "time-out rooms." Neither, the Individuals with Disabilities Education Act (IDEA) nor Section 504 of the Rehabilitation Act of 1973 provides specific guidance on this issue. Therefore, the SEO bases the following guidance on a review of relevant case law and state safety codes.

The Definition of Time-Out

The SEO defines the term *time-out* as a continuum of behavior management techniques that are designed to address inappropriate or negative student behavior resulting from over-stimulating or challenging classroom situations. This continuum begins with minimally intrusive or restrictive strategies that can be implemented within the classroom setting. The continuum then progresses to more restrictive strategies that may involve the physical separation of a student from his or her classmates, **for a brief amount of time**, in order to enable the student to regroup and **return to the classroom setting**.

The time-out continuum of behavior management techniques begins with responses to student behavior that do not result in the student's removal from the classroom setting. Examples of these less intrusive strategies include planned ignoring of the behavior and discussing the behavior with the student immediately. The continuum then progresses to in-class strategies that require the student to cease classroom activity for a short period of time. However, the student is not removed from the classroom setting. Strategies along this point in the continuum may include placing the student in a time-out corner of the classroom for a specified period of time in order to enable him or her to regain composure and resume classroom activity. Classroom

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teachers may designate a specific location within the classroom to use for this purpose. Finally, the time-out continuum includes strategies that require the student's removal from the classroom setting altogether for a **brief amount of time** in order for the student to regroup in private prior to returning to the classroom setting. The more restrictive time-out strategies may include relocating the student to the hallway, another classroom, or a school time-out room.

In situations where a student with a disability demonstrates behavior that impedes his or her learning or that of others, the IDEA requires the IEP team to consider, when appropriate, positive behavioral interventions, strategies, and supports to address that behavior. IEP teams may consider the use of time-out as a **positive intervention** and design time-out strategies to assist students in correcting the attitude and/or behaviors that interfere with their ability to remain in the classroom as part of the student's Behavioral Intervention Plan (BIP). **However, the SEO does not condone the use of time-out as a punishment for negative student behavior or as a means of removing the student indefinitely from the classroom setting, as it does not meet the intent of the IDEA.** The use of time-out must have positive implications, including enabling the student to return to the classroom setting.

A district or school's decision to remove a student from regular activity and placing him or her in an isolated setting, such as a time-out room, can have legal implications. The following section discusses relevant case law pertaining to the use of time-out rooms for students with disabilities.

Case Law Related to the Use of Time-Out Rooms

Courts have held that placing a student in a locked time-out room might be "excessively intrusive" depending on the student's age and emotional disability. A student's placement in time-out can, in some instances, be deemed an "unreasonable seizure" in violation of the Fourth Amendment. An unreasonable seizure is a removal that is not justified before or at the time of placement and is not within reason given the student's age, sex, disability, and the nature of the infraction. An "unreasonable seizure" of a student also occurs when he or she is not properly informed of the purpose of the time-out area or the reason for his or her removal from the classroom. Therefore, if a student with a disability and his or her parent are not made aware, through the IEP process, of how the time-out will be utilized and the projected outcome or purpose of the use of time-out strategies, placement in a time-out room may be considered an unreasonable seizure.

In determining whether a placement in a time-out area is an unreasonable seizure, courts must consider two issues. First, the courts must consider whether the student established that he or she was "seized" within the meaning of the Fourth Amendment at the time that he or she was sent to the time-out room. Second, the court must consider whether the time-out was reasonable. Two federal district court decisions defined the circumstances under which a court may find that a district violated the constitutional ban on unreasonable seizures¹. These courts considered the following factors. In addition, the SEO provides questions and comments for IEP team discussion points when considering the use of time-out rooms for students with disabilities.

¹ See *Rasmus v. State of Arizona*, 24 IDELER 824 (D. Ariz. 1996) and *Hayes v. Unified School District No. 377*, 559 IDELER 249 (D. Kan. 1987).

- **Nature of the misconduct.** Can the student's behavior be addressed through a less intrusive time-out strategy within the classroom setting? Or, does the student's behavior warrant his or removal from the classroom?
- **Location of the time-out room.** Where is the time-out room in relation to the student's classroom? Does the student's behavior justify the time it takes to transfer the student to and from the time-out room?
- **Size of the time-out room.** Is the time-out room of adequate size to accommodate the student and the school staff person who is responsible for supervising the student for the duration of his or her placement in the time-out room?
- **Interior of the time-out room.** Is the interior of the time-out room indicative of a punitive setting? Or, is it an environment that enables the student to de-escalate and thereby return to and participate in the classroom setting?
- **Safety considerations.** Is the time-out room a safe setting for both the student and the staff person supervising him or her? Have all dangerous objects been removed from the room? Does the time-out room meet all state, local, and fire code requirements?
- **Amount of time spent out of the classroom in isolation.** Did the amount of time the student spent in the time-out room correspond with his or her age and cognitive ability? Has the IEP team considered the student's age, sex, disability, and the nature of his or her behavior in determining the maximum amount of time the student can spend in the time-out room? Best practice dictates that in most cases, the number of minutes a student spends in a time-out room should typically equal the student's age, but should not exceed 10-15 minutes. In addition, when making this determination, the IEP team must consider the cognitive functioning of the student.
- **How time was spent during time-out.** Was the student provided with assistance in regaining his or her composure through discussing the behavior or utilizing other interventions identified within the IEP? Is there a written plan (i.e., BIP) that outlines what to do once a teacher places the student in the time-out room?
- **District policy on time-out.** Does the district have policies and procedures on the use of time-out rooms for all students? If not, districts and/or schools operating time-out rooms must develop formal policies and procedures that ensure the protection of students' personal rights.

A reasonable seizure, therefore, is one that has a clearly defined and documented objective or purpose and considers the age, sex, and disability of the student, as well as the nature of the student's behavior. In the case of a student with a disability, placement in a time-out room is considered reasonable if it is a part of a well-documented set of interventions aimed at improving the student's behavior in the classroom setting. The SEO expects that documentation of interventions would occur through the IEP process, which includes conducting a Functional Behavioral Assessment (FBA) and developing a Behavioral Intervention Plan (BIP). The SEO also expects that districts and/or schools will obtain written permission from parents authorizing the use of time-out rooms as a part of a student's BIP and IEP.

Technical Assistance from New Mexico State Fire Marshall's Office

In addition to the above-cited court decisions, the SEO sought technical assistance from the New Mexico State Fire Marshall's Office. Subsection 5-2.1.5, Chapter 5, Means of Egress of the Life Safety Code (1997 Edition), provides as follows:

Locks, Latches, and Alarm Devices

Doors shall be arranged to be opened readily from the egress side whenever the building is occupied. Locks, if provided, shall not require the use of a key, a tool, or special knowledge or effort for operation from the inside of the building.

Further, the New Mexico State Fire Marshall's Office explicitly stated that all doors (including those to time-out rooms) are to "remain open and accessible at all times." The doors should remain "free and clear of all obstructions in the event of fire or other emergency." Students placed in a time-out room should be able to self evacuate or be assisted in evacuation without delay.

Recommended Procedures for Utilization of Time-Out Rooms

In light of the court decisions and guidance from the New Mexico State Fire Marshall's Office, the SEO offers the following guidance to districts and schools who use time-out rooms or are considering constructing them.

- **Districts must develop policies and procedures outlining the use of the time-out continuum of behavior management techniques, specifically the use of time-out rooms.** Policies and procedures should include clearly written procedures that the school or district will follow when implementing time-out behavior management techniques, especially time-out rooms. In addition, the district and/or school must include in its policies and procedures its method of providing students with disabilities adequate notice (through the IEP process) to enable them to protect themselves from being placed in a time-out room. Specifically, IEP teams must ensure that students and parents understand the purpose of the time-out rooms and the behaviors that would result in placement in the time-out room. The district and/or school should also notify the student and the parents (through the IEP process) of the maximum number of minutes a student will be placed in time-out and indicate that extended time-outs beyond that limit will not be used without notification of administrative personnel and parents. The range used most often by districts is a maximum of 10-15 minutes.² It is important to note that not all students would require this maximum amount of time in the time-out room.
- **Adopt a continuum of time-out strategies.** Districts must be able to demonstrate that a variety of time-out strategies are available for use with students. Districts must not resort to student isolation (time-out rooms) as a means of eliminating negative behavior in all instances. Not all behaviors require the student's immediate removal from the classroom.

² See *Marion County (Florida) School District*, 20 IDELR 634 (OCR 1993).

- **Time out rooms must be designed and constructed in compliance with all SDE, local, and fire code regulations.** Time-out rooms must have adequate heating, lighting, and ventilation and be free of any dangerous objects.
- **Do not lock a time-out room.** The time-out rooms must remain unlocked and free and clear of obstructions. In the event of a fire or other emergency, occupants must be able to self evacuate or be assisted without delay.
- **Staff must directly supervise or monitor the student while he or she is in a time-out room or other time-out area.** Some students are agitated in these circumstances. Do not discount the possibility of self-injury even when there is no obvious instrument for inflicting injury in time-out rooms.
- **Obtain parental consent prior to using time-out rooms.** The parents of a student with a disability must be notified, through the IEP and BIP processes, that a time-out room or other time-out strategy will be utilized in order to assist the student in reducing negative behaviors. In addition, districts must obtain parental consent in order to utilize the more restrictive forms of time-out, specifically time-out rooms.
- **The duration of placement in a time-out room must be reasonable in light of factors such as student's age, sex, disability, cognitive functioning, and the nature of the student's misbehavior.** As a matter of best practice, a student should remain in a time-out room only until he or she becomes sufficiently self-controlled to rejoin classmates. A time-out is an opportunity for a student to regain his or her composure. Do not use timeout as a punishment for disruptive behavior.³
- **A student placed in a time-out room must be permitted to use the bathroom.** Staff must consider events that preceded the student's behavior (lunch, medications) that may result in the student needing to relieve him or herself.
- **The use of time-out must be consistent with the student's IEP and Behavioral Intervention Plan (BIP).** It is a denial of a Free Appropriate Public Education (FAPE) if the use of time-out is inconsistent with the student's IEP and BIP.⁴
- **Districts must keep accurate records on students placed in time-out.** The records should include the date, time, length of placement, the basis for the placement, and the teacher who made the placement determination. In addition, the records should also indicate the assistance provided to help the student regain composure. This data collection will enable the IEP team in evaluating the effectiveness of the BIP and to determine the effectiveness of the more restrictive time-out strategies on improving student behavior. See the attached suggested time-out data collection form.

³ See, e.g., *Orange v. County of Grundy*, 950 F. Supp. 1365 (E.D. Tennessee 1996).

⁴ See *OSEP Memorandum 95-16*, 22 IDLER 531 (OSEP 1995).

In addition, IEP teams must consider the following conditions prior to including time-out rooms as an intervention in a student's BIP:

- Complete an evaluation to determine if the student's placement in a time-out room is in direct conflict with the student's psychological or physical health status.
- Determine the maximum amount of time a student will spend in a time-out room. The recommended amount of time a student spends in a time-out room typically corresponds with the student's age, but should not exceed 10-15 minutes. However, consideration should also be given to the level of the student's cognitive functioning.
- Identify and list the specific criteria for returning the student to the routine activities and the classroom environment.
- The IEP team should include a provision within the BIP for continuous monitoring by trained staff.

It is important to note that Section 504 governs the imposition of time-out for students with disabilities. **A district's time-out policy should follow the same guidelines and procedures for both disabled and non-disabled students.**

If you have additional questions regarding the use of time-out rooms please contact our office at (505) 827-6541 and ask to speak to an available consultant.

Cc: Memo file
SEO Consultants



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DR. VERONICA C. GARCÍA
SECRETARY OF EDUCATION

BILL RICHARDSON
Governor

March 14, 2006

MEMORANDUM

To: Superintendents
Special Education Directors
Charter Schools
RECs

From: Denise Koscielniak (Signature on File)
State Director of Special Education

Through: Dr. Patricia Parkinson (Signature on File)
Assistant Secretary of Instructional Support

**RE: USE OF PHYSICAL RESTRAINT AS A BEHAVIORAL INTERVENTION
FOR STUDENTS WITH DISABILITIES**

The use of physical restraint as a behavioral intervention for students with disabilities in public schools may be justified in certain instances, but this type of intervention can pose a serious risk to the student, as well as to the person(s) applying the restraint. Therefore, the New Mexico Public Education Department (NMPED) provides the following detailed guidance for the appropriate use of physical restraint for students with disabilities in districts and charter schools. We note that neither the Individuals with Disabilities Education Act (IDEA) nor Section 504 of the Rehabilitation Act of 1973 provides specific guidance on this issue, so the NMPED bases this guidance on a review of relevant IDEA requirements for addressing student behavior and recommended practices from experts and professional organizations.

Regulatory Requirements

In situations where a student with a disability demonstrates behavior that impedes his or her learning or that of others, the IDEA 2004 at 20 U.S.C. 1414(d)(3)(B)(i) requires the student's

Individualized Education Program (IEP) team to consider positive behavioral interventions, strategies, and supports to address that behavior. In a case where the student's problematic behavior is **severe, persistent, and frequent**, the NMPED has consistently interpreted this requirement to mean that the IEP team develops a Behavioral Intervention Plan (BIP) based on a Functional Behavioral Assessment as part of the IEP for that student. The BIP needs to emphasize positive interventions, strategies, and supports that teach appropriate replacement behaviors.¹ However, an effective BIP must also address and specifically provide for emergency situations where a particular student exhibits aggressive, violent, or dangerous behavior that requires an immediate aversive intervention, such as physical restraint. In that case, physical restraint is designed to

- protect the student and others from serious injury; or
- safeguard physical property; and
- should be used only in an emergency.

Types of Physical Restraint

The most common forms of physical restraint are **mechanical** restraints and **manual** restraints.

- **Mechanical** restraint involves the use of any device such as a blanket, tape, straps, blindfolds, or tie downs as a method of restricting a student's movement or activity.
- **Manual** restraint (also known as "therapeutic holding") involves one or more people using their bodies to restrict the student's body movement. The purpose of this type of restraint is to allow the student to reestablish self-control and/or maintain safety for others in the environment.

The NMPED does not condone the use of **mechanical** restraint of students. However, we recognize that there may be certain instances where **manual** restraint of a student may be necessary, so the remainder of this guidance addresses its appropriate use for students with disabilities.

We note that escorting a student (touching and/or holding a student without the use of force) is **not** considered a form of physical restraint. Similarly, the use of "time out" is **not** considered a form of physical restraint and the NMPED issued guidance on the appropriate use of this behavioral intervention in August 2003.² We also emphasize that nothing in this guidance would preclude a teacher or other staff member from using reasonable force to protect themselves, students, or other persons from assault or imminent, serious physical harm.

Authorization for Physical Restraint

- **In all cases**, the use of physical restraint must be approved by the student's IEP team, documented in the student's BIP, have the expressed written agreement of the parent or

¹ See the State's *Technical Assistance Manual: Addressing Student Behavior—A Guide for Educators*. This manual is available on the Special Education/Publications link at the NMPED's website at www.ped.state.nm.us

² See footnote #1 at Appendix B.

legal guardian, and be addressed in the public agency's Prior Written Notice of Actions Proposed (PWN) provided to parents following an IEP meeting. The IEP team approves the type of restraint to be used, who is authorized to apply it, the specific setting or conditions under which the use of restraint shall apply, how it will be monitored by other staff, as well as reporting requirements for when restraint is used.

- **In all cases**, a mental health professional (i.e., social worker, counselor, psychologist) needs to be member of the IEP team if physical restraint is being considered as an intervention. The mental health professional reviews all information about the student and observes the student prior to making recommendations at the IEP meeting about the use of physical restraint in the BIP. A recommendation could include the need for additional evaluative or other information before imposing physical restraint in the student's BIP.
- **In some cases**, the IEP team may also need to seek approval from the student's medical provider if the use of physical restraint might adversely impact or be in conflict with any medical/physical/mental condition that the student may have or be suspected of having.

Recommended Implementing Policy and Procedures

We offer the following guidance to IEP teams and building administrators:

- **The IEP team must craft the BIP so as to use a graded system of alternatives for the student's behavior.** In other words, positive interventions are the first methods for addressing unacceptable behavior. A variety of such interventions designed to de-escalate a crisis should be listed in the student's BIP, as well as a provision to warn the student that restraint will be used if the target behavior does not stop. Verbal threats or refusal to comply with a staff directive or school rule would not warrant physical restraint unless this is agreed upon in the BIP. Physical restraint is the last resort to protect the student and others from harm. However, its immediate use may be justified if there is imminent, serious danger only.
- **The IEP team needs to establish that other less restrictive interventions have not been effective.** The provision for physical restraint that is in the BIP is only appropriate if less restrictive behavioral management techniques have been tried and documented as not working for the behaviors for which physical restraint will apply.
- **The use of physical restraint must be consistent with the student's IEP and Behavioral Intervention Plan (BIP).** Applying the IDEA, the use of physical restraint is restricted the same way the law restricts the use of other teaching or behavioral interventions methods in general. That is, it is a denial of a Free Appropriate Public Education (FAPE) if the use of physical restraint is inconsistent with the student's IEP and BIP.³

³ See *OSEP Memorandum 95-16*, 22 IDLER 531 (OSEP 1995).

- **Physical restraint procedures must be performed by trained personnel only.** (See “Staff Training” below.)
- **Restraint may not used as a form of punishment.** Nor should it be used to force compliance from a student.
- **No form of physical restraint may be used that restricts a student from speaking or breathing.** The restraint must be applied in such a way that it is safe and only reasonable force is used. A responsible third party should monitor the student’s status during the restraint procedure to check respiration and skin color, and to see that limbs are not moved out of the normal range of motion. The restraint should be immediately discontinued if the student exhibits any signs of undue physical distress or injury. In addition, the restraint must not be applied any longer than is necessary to protect the student from causing harm to himself or others.
- **Do not restrain the student in front of other students.** If possible, move to another location or clear the setting of other students.

Staff Training

- **Any staff or staff team designated to apply physical restraint must be professionally trained and/or certified in the particular technique being used.** This must happen prior to any such procedures being used on a student. Staff chosen to be trained to apply physical restraint should be individuals who are physically able to do so and can handle a crisis in a calm manner.
- **The professional training needs to emphasize the use of positive interventions, including verbal de-escalation techniques and other strategies to be attempted prior to using physical restraint.** Resources for this kind of training include, but are not limited to, Positive Behavioral Intervention and Supports (www.pbis.org), Crisis Prevention Institute (www.crisisprevention.com), and The Mandt System (www.mandtsystem.com).

Recommended Documentation and Reporting

- **Any incident of physical restraint should be immediately reported to the building administrator and be documented.** Include the following in a written report:
 - Name of the student
 - Date and description of the incident that led to the restraints
 - Names and titles of staff member(s) who applied the restraints and monitored it
 - Other interventions tried
 - Type of restraints used
 - Length of time the restraints was applied
 - Any injuries sustained by the student or staff
 - Information about the student’s behavior after the restraints and any further action taken by school staff including disciplinary action

- **The student's parents should be informed about the use of the restraint.** Provide a verbal report to parents the same day. This should be followed up by a written report 1–2 days later.

Local Policy

Districts and charter schools should develop policies and procedures outlining the use of physical restraint. Districts and charter schools are encouraged to adopt this guidance as a minimum to their local policy on the use of physical restraint. **Local policy for physical restraint for students without IEPs should be authorized by the school's Section 504 team, or the Student Assistance Team (SAT), as well as the parents as part of the student's BIP, Section 504 Plan, or SAT Intervention Plan.⁴ Protection for students not yet eligible for special education and related services is governed by 20 U.S.C. 1415(k)(5).**

Please copy this guidance and distribute it to all relevant staff, administrators, parents, and school board members. If you have additional questions regarding the use of physical restraint with students with disabilities, please contact the Special Education Bureau at (505) 827-1457 and ask to speak to an available consultant.

PP/dk/pb

cc: Veronica C. García, Ed. D., Secretary of Education
Dr. Cross Maple, Deputy Secretary of Learning and Accountability
Mr. Willie Brown, Office of General Counsel

⁴ See the State's *Technical Assistance Manual: The Student Assistance Team and the Three Tier Model of Student Intervention* available at Parents/Students link at www.ped.state.nm.us.

The Use of Restraint and Seclusion in Public Schools:
Collective Statement of Advocacy Organizations and
Private Attorneys Working with Children with Disabilities

RECEIVED
VIA E-MAIL

SEP 09 2009

Concerns for any public education student regarding use of restraint and seclusion:

1. The use of restraint and seclusion pose significant risk of harm, including death, to children, and present risk of physical injury to educators.
2. Children in public schools should have statutory protections against the use of restraint and seclusion.*
3. Restraint and seclusion are not educational tools; they are emergency interventions to be used only in emergency situations when it is necessary to protect a child or another from imminent, serious, physical harm.
4. Restraint and seclusion are evidence of program failure in school.
5. Anyone who restrains or sends a child to seclusion should have significant, specialized training in proper restraint procedures and documentation should be required.

Specific concerns for children with disabilities regarding the use of restraint and seclusion:

1. Restraint and seclusion are currently used primarily with children with disabilities.
2. Restraint and seclusion are not educational interventions and do not belong in Individual Education Programs.
3. If restraint and/or seclusion are used on children with disabilities, an IEP meeting should be held immediately to identify the program failure that led to the incident.
4. Use of restraint and seclusion as educational interventions contradicts the Individuals with Disabilities Education Act which emphasizes the implementation of positive behavioral supports.
5. Use of restraint and seclusion in a public school setting further stigmatizes children with disabilities when children without disabilities observe how adults interact with the student through forcible management and containment. Children without disabilities will want to avoid the frightening adult behavior and will avoid interaction with the child who is restrained.
6. Repeated reliance on restraint and seclusion dehumanizes the children and adults involved.
7. Children who anticipate restraint and seclusion at school will avoid school attendance, decreasing educational opportunity.

* Please see next page for statutory protections for children regarding use of restraint and seclusion already established in the New Mexico Children's Code.

SOURCE: Pegasus Legal Services for Children; Disability Rights New Mexico (formerly the Protection and Advocacy System); The New Mexico ACLU; Native American Disability Law Center; Parents Reaching Out; New Mexico Family Network; Diane Garrity; and Gail Stewart

The New Mexico Children's Code already protects children against the use of restraint and seclusion in *treatment and habilitation settings* and defines restraint and seclusion as follows:

"restraint" means the use of physical, chemical or mechanical restraint;

"physical restraint" means the use of physical force without the use of any device or material that restricts the free movement of all or a portion of a child's body;

"mechanical restraint" means any device or material attached or adjacent to the child's body that restricts freedom of movement or normal access to any portion of the child's body and that the child cannot easily remove but does not include mechanical supports or protective devices;

"chemical restraint" means a medication that is not standard treatment for the patient's medical or psychiatric condition that is used to control behavior or to restrict a patient's freedom of movement;

"seclusion" means the confinement of a child alone in a room from which the child is physically prevented from leaving.

Under the Children's Code the Following are Not Considered Restraint:

"mechanical support" means a device used to achieve proper body position, designed by a physical therapist and approved by a physician or designed by an occupational therapist, such as braces, standers or gait belts, but not including protective devices;

"protective devices" means helmets, safety goggles or glasses, guards, mitts, gloves, pads and other common safety devices that are normally used or recommended for use by persons without disabilities while engaged in a sport or occupation or during transportation;

32A-6A-9

A. Nothing in this section shall be interpreted to diminish the rights and protections accorded to children in hospitals or psychiatric residential treatment or habilitation facilities as provided by federal law and regulation.

B. Restraint and seclusion as provided for in this section is not considered treatment. It is an emergency intervention to be used only until the emergency ceases.

C. Nothing in this section shall prohibit the use of:

(1) mechanical supports or protective devices;

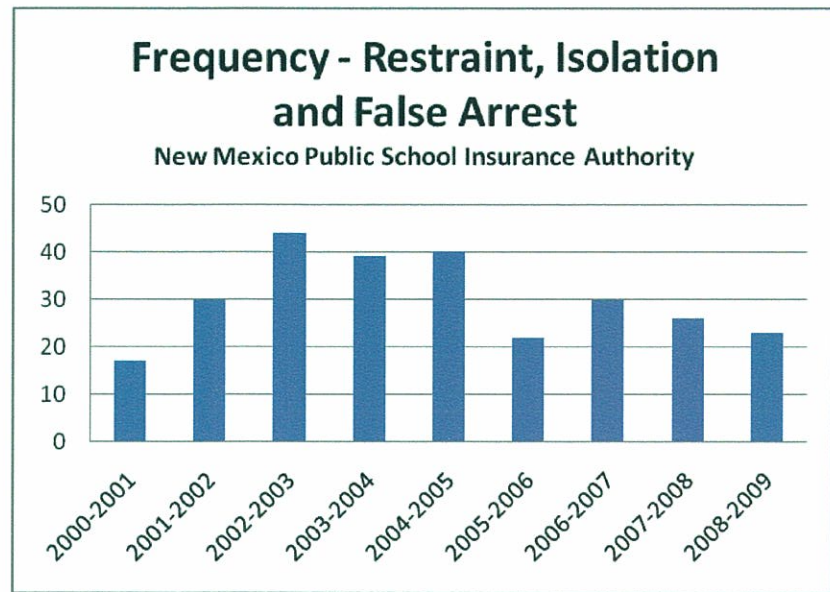
(2) a medical restraint prescribed by a physician or dentist as a health-related protective measure during the conduct of a specific medical, surgical or dental procedure; and

(3) holding a child for a very short period of time without undue force to calm or comfort the child or holding a child's hand to escort the child safely from one area to another.

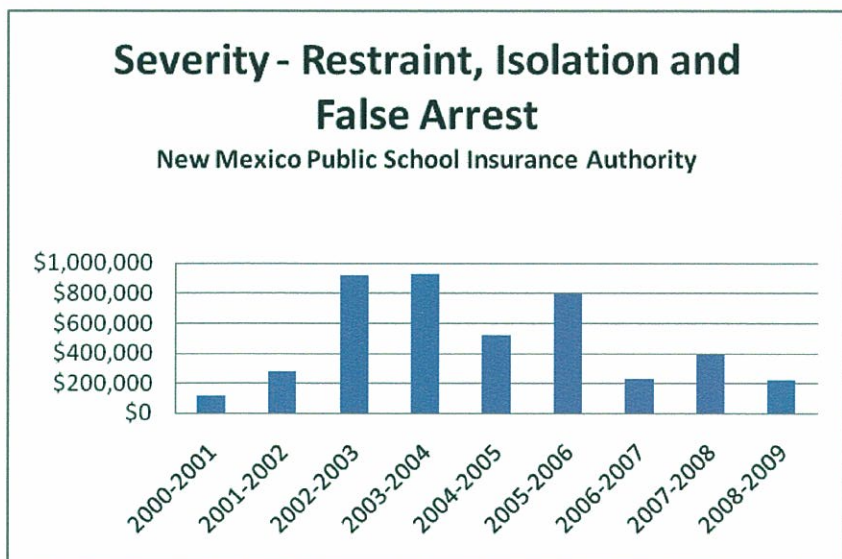
ATTACHMENT 4

The following represents claims filed against New Mexico Public Schools for False Arrest, Improper restraint and/or Isolation. Unfortunately, the NMPSIA data is not specific to Special Education students and therefore represents claims from all levels of students.

School Yr	Freq.
2000-2001	17
2001-2002	30
2002-2003	44
2003-2004	39
2004-2005	40
2005-2006	22
2006-2007	30
2007-2008	26
2008-2009	23
Total	271



School Yr	Severity
2000-2001	\$112,818
2001-2002	\$277,879
2002-2003	\$916,342
2003-2004	\$927,321
2004-2005	\$519,424
2005-2006	\$801,061
2006-2007	\$230,413
2007-2008	\$394,579
2008-2009	\$224,919
Total	\$4,404,757



SOURCE: Poms & Associates Insurance Brokers, Inc.

USE OF TIME-OUT
POLICY

RECEIVED
VIA E-MAIL

SEP 09 2009

PURPOSE

The purpose of this policy is to provide for the appropriate use of time out and isolation and to protect students from harming themselves, other students, staff or property in a manner that protects the student's dignity and well-being.

DEFINITION

Time-Out and Isolation is a method used to remove a student from his regular classroom setting to an area which provides isolation from the general classroom environment and which involuntarily restricts a person's movement outside of the designated area. The New Mexico PED defines the term *time-out* as a continuum of behavior management techniques that are designed to address inappropriate or negative student behavior resulting from over-stimulating or challenging classroom situations. This continuum begins with minimally intrusive or restrictive strategies that can be implemented within the classroom setting. The continuum then progresses to more restrictive strategies that may involve the physical separation of a student from his or her classmates, for a brief amount of time, in order to enable the student to regroup and return to the classroom setting.

TIME-OUT AND ISOLATION POLICY

The use of time and/or isolation should only be used when the student's behavior cannot be modified through the use of other techniques and should be used only for time periods of short duration.

Use of Time-out Strategies

In situations where a student demonstrates behavior that impedes his or her learning

or that of others, school staff may consider the use of time-out **as a positive intervention** and design time-out strategies to assist students in correcting the attitude and/or behaviors that interfere with their ability to remain in the classroom. **Use of time-out will not be used as a punishment for negative student behavior or as a means of removing the student indefinitely from the classroom setting.** The use of time-out must have positive implications, including enabling the student to return to the classroom setting.

In circumstances involving students who receive special education services the IDEA requires the IEP team to consider positive behavioral interventions, strategies, and supports to address that behavior including the use of time-out. It should not be used as a punishment or as an indefinite removal from the classroom setting.

In all circumstances the student should be placed in a safe environment in which the staff can observe the student at all times and the necessary behavior identified which will allow the student to return to the general classroom setting.

Each time a student is sent to time-out or isolation must be documented including the efforts utilized prior to sending the student to time-out to modify or correct the disruptive behavior. That documentation should include identifying the precipitating behavior and the results of the use of time-out.

SCHOOL DISTRICT
RESTRAINT POLICY

RECEIVED
VIA E-MAIL

SEP 09 2009

PURPOSE

The purpose of this policy is to provide for the appropriate use of restraints and to protect students from harming themselves, other students, staff or properly in a manner that protects the student's dignity and well-being.

DEFINITION

A restraint is a method used to physically and involuntarily restrict a persons movement or physical activity.

RESTRAINT POLICY

Physical restraint should only be used in emergency situations, after less intrusive alternatives have failed or been deemed inappropriate, and with caution. If student's Behavior Intervention Plan calls for restraint the requirement of an emergency situation is eliminated. School personnel should use physical restraint with two goals in mind:

- (a) to administer physical restraint only when needed to protect the student, other students and/or a school staff member from imminent harm; and
- (b) to prevent or minimize any harm to the student as a result of the physical restraint

Only those individuals who have been properly trained in physical restraint will use physical restraint on a student. Whenever possible, the administration of a restraint will be witnessed by at least one adult who is not participating in the restraint. Training as required by

individual programs will be provided to maintain certification in that program. Students who have known medical or psychological limitations on restraint will be restrained only in cases of imminent danger to self or others and only with caution.

Each incident of restraint should be reported to the principal and any restraint on a student with medical or psychological limitations will also be reported to the school nurse for review. The report should include the names of the school staff involved, the name of the student involved and a description of the incident leading up to the restraint and the procedures used in the restraint along with information regarding whether any additional actions are required by the school. Following the release from a restraint the participants will implement follow-up procedures. These procedures will include reviewing the incident with the student to address the behavior that precipitated the restraint, review of the incident with the person who administered the restraint to discuss whether proper procedures were followed and follow-up to determine if any discussion needs to occur with those who witnessed the incident. Parents should be notified as soon as is reasonable and in no event later than 8 hours after the restraint has terminated and they should be provided with a copy of the report outlining the reasons for the restraint and the procedures followed both before and after the restraint has been conducted.

If a student who receives special education services also has a Behavior Intervention Plan which contemplates the use of restraint the IEP team should consider other de-escalation techniques as the first response and restraint only as a last resort to prevent harm to the student and others. The preceding steps should also be followed for each restraint carried out pursuant to an IEP.